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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**
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9 **Jack C. Conroy,**
10 Petitioner

11 -vs-
12 **United States Marshal, et al.,**
13 Respondents

14 CV-08-0182-PHX-MHM (JRI)

15 **REPORT & RECOMMENDATION**
16 **On Petition for Writ of Habeas Corpus**
17 **Pursuant to 28 U.S.C. § 2241**

18 **I. MATTER UNDER CONSIDERATION**

19 Petitioner, presently incarcerated in the Maricopa County Jail at Phoenix, Arizona,
20 filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on January 29, 2008
21 (#1). On July 25, 2008 Respondent Arpaio filed his Joinder (#22) in an Answer and Motion
22 to Dismiss filed by the United States Marshal Service (#13). On September 5, 2008,
23 Respondent Gonzalez, United States Marshal, filed an Answer and Motion to Dismiss or in
24 the alternative Motion for Summary Judgment (#31), incorporating by reference the prior
25 response by the United States Marshal Service (#13). On August 11, 2008, Petitioner filed
26 his Reply (#25) to Respondent Arpaio's Answer. On October 14, 2008, Petitioner filed his
27 Response (#37) to Respondent Gonzalez' Motion for Summary Judgment.

28 In addition, on August 11, 2008, Petitioner filed a Motion for Transfer to Federal
Custody (#27). No response to that motion has been filed.

The Petitioner's Petition and Motion to Transfer are now ripe for consideration.
Accordingly, the undersigned makes the following proposed findings of fact, report, and
recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b),
Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of
Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

Federal Prosecution - On April 6, 2001, Petitioner was sentenced in the District Court for the District of Arizona to time served and three years supervised release on bank larceny charges. (CR-00-0994-PHX-SMM, #25.) Subsequently, a petition for violation of the terms of his supervised release was filed, and an arrest warrant was issued. (*Id.* at #29 & 30.) Petitioner was in state custody, and accordingly the United States Marshals Service (USMS) began issuing federal detainers to the various state jurisdictions who were detaining Petitioner. These included detainers issued on April 23, 2002, March 16, 2004 (Response, #25 at Exh. 1), and May 1, 2007.

State Custody - Upon issuance of the original federal detainer on April 23, 2002, Petitioner was in custody at the Maricopa County Jail. On July 18, 2002, he was sentenced by the state court to serve a 2.5 year sentence for forgery. (Petition, #1, Memorandum at 2.) On August 2, 2002, he was transferred to the custody of the Arizona Department of Corrections (ADOC). On October 29, 2003, and despite the federal detainer, ADOC released Petitioner.

On March 16, 2004, Petitioner was arrested by the Tempe Police Department, and the USMS issued a new federal detainer. On November 17, 2005, Petitioner was sentenced to 28 years. Petitioner was eventually again returned to ADOC, who acknowledged the federal detainer on December 23, 2005. On March 20, 2007, Petitioner's sentence was set aside in a post-conviction relief proceeding. The trial court found that Petitioner's plea was not knowingly and voluntarily made, and thus set aside the sentence and reinstated the original charges. The state is currently appealing that ruling.

On April 10, 2007, Petitioner was transferred to the Maricopa County Jail to face new charges for sexual assault and kidnapping. His state sentence expired on May 1, 2007, and a new federal detainer was issued to the Maricopa County Jail. Petitioner remains

1 incarcerated at the Maricopa County Jail.¹

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3 **B. PRESENT FEDERAL HABEAS PROCEEDINGS**

4 **Petition** - Petitioner instituted this proceeding by filing his Petition for Writ of Habeas
5 Corpus pursuant to 28 U.S.C. § 2241 on July 29, 2008 (#1). Petitioner asserts he is held
6 pursuant to the judgment in CR-00-0994-PHX-SMM, and the federal detainer, and has been
7 held exclusively under that detainer since March 20, 2007, when his state sentence was set
8 aside. Petitioner raises the following four grounds for relief:

9 1. **Expired Probation** - Petitioner argues that he was sentenced to 18 months
10 "probation" and that he has served 1,964 days in state custody, and that 285 of
11 those days, beginning March 10, 2007, were "as a result of the Federal
12 Detainer." (#1 at 5.)

13 2. **Due Process** - Petitioner argues that his detention pursuant to the federal
14 detainer is a violation of due process because he was not provided a hearing
15 before "his liberty was taken by the Federal Detainer." (*Id.*)

16 3. **Right to Counsel** - Petitioner argues that his right to counsel has been denied
17 because he was not provided counsel while awaiting a probation violation
18 hearing. (*Id.* at 6.)

19 4. **Rule 8 Violation** - Finally, Petitioner argues that he has been denied a "Rule
20 8 Hearing."² (*Id.* at 7.)

21 **Responses** - On May 30, 2008, the United States Marshal Service filed an Answer and
22 Motion to Dismiss or in the alternative Motion for Summary Judgment (#13) asserting that

23 _____

24 ¹ Much of the factual and procedural background is based upon undocumented
25 information provided in the Answer filed May 3, 2008 (#13). 28 U.S.C. § 2248 provides:
26 "[t]he allegations of a return to the writ of habeas corpus or an answer to an order to show
cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the
extent that the judge finds from the evidence that they are not true."

27 ² Presumably, Petitioner refers to a speedy trial hearing pursuant to Arizona Rule of
28 Criminal Procedure 8.1 *et seq..*

1 Petitioner was not in custody pursuant to the federal detainer, but was held pursuant to state
2 prosecutions, and that any challenge to his custody pursuant to his federal conviction could
3 only be filed under 28 U.S.C. § 2255.

4 On June 2, 2008, Respondent Arpaio filed a joinder (#14) in the USMS Motion to
5 Dismiss (#13). Because that joinder did not extend to joining in the Answer, and in light of
6 the service order precluding a dispositive motion in lieu of an answer, this filing was stricken.
7 (Order 7/1/8, #19.) In response, on July 25, 2008, Respondent Arpaio joined in the Answer
8 and Motion to Dismiss filed by the USMS.

9 On September 5, 2008, the undersigned noted that the proper respondent was not the
10 United States Marshals Service, but David Gonzalez, the United States Marshal.
11 Consequently, a response by Respondent Gonzalez was ordered (#30). On September 5,
12 2008, Respondent Gonzalez filed an response (#31), adopting the Answer and Motion to
13 Dismiss or in the alternative Motion for Summary Judgment (#13) previously filed on behalf
14 of the United States Marshal Service.

15 **Replies** - On June 17, 2008, Petitioner filed his "Response" (#17) to the USMS
16 Answer and Motion to Dismiss. Petitioner argues that his plea agreement in CV-00-0994-
17 PHX-SMM stipulated to a maximum of 18 months of "probation". He argues that the only
18 justification for his detention since the March 20, 2007 vacating of his sentence has been the
19 federal detainer, and that he has been afforded no hearings or counsel to justify his detention
20 under the federal sentence. Petitioner provides copies of correspondence with his public
21 defender in the state proceedings, advising that Petitioner was being held at the county jail
22 pending a resolution of the appeal of the vacating of his state sentence. (#17, Exh. A.)

23 On October 14, 2008, Petitioner filed his Response (#32) to Respondent Gonzalez'
24 Motion for Summary Judgment (#31). Petitioner again argues that there is no basis for his
25 being held by the State of Arizona, and thus he is held only pursuant to the Federal Detainer.

26 **Motion to Transfer** - On August 11, 2008, petitioner filed a Motion for Request for
27 Transfer (#27), seeking to be transferred to federal custody to answer the charges of violation
28 of his supervised release. Respondents have not responded to this motion.

III. APPLICATION OF LAW TO FACTS

2 **Petition** - To the extent that Petitioner challenges any detention or action in relation
3 to his federal conviction (e.g. that his supervised release term has expired), he may not do
4 so by a petition pursuant to 28 U.S.C. § 2241. “In general, § 2255 provides the exclusive
5 procedural mechanism by which a federal prisoner may test the legality of detention.”
6 *Lorensten v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000). While the statute provides an
7 exception where the § 2255 motion “is inadequate or ineffective to test the legality of his
8 detention”, 28 U.S.C. § 2255, Petitioner fails to establish that such a motion is insufficient
9 to address any objection he may have to his federal proceedings or the federal detainer. The
10 same is not true to the extent that Petitioner is challenging his detention by state authorities.
11 See *White v. Lambert*, 370 F.3d 1002 (9th Cir. 2004) (recognizing that 28 U.S.C. § 2254 does
12 not establish a procedure separate from § 2241, but merely imposes limitation on relief under
13 § 2241 where the prisoner is “in custody pursuant to the *judgement* of a State court”). Here,
14 Petitioner’s Petition attempts to straddle the two, and thus names the Sheriff and the U.S.
15 Marshal.

16 Petitioner's entire Petition is based on the premise that the vacating of his state
17 conviction terminated the state's right to detain him, and thus his subsequent and current
18 incarceration must be as a result of the federal detainer. However, the vacating of Petitioner's
19 sentence did not amount to a dismissal of those criminal proceedings nor a discharge of
20 Petitioner from state custody. Rather, the trial court simply found Petitioner's plea was not
21 knowingly and intelligently made, set aside the sentence and ordered the original charges
22 reinstated. (Response #32,Exh. 4, M.E. 3/20/7.) As Petitioner was advised by his defense
23 counsel, because there was no longer a conviction, ADOC no longer had "jurisdiction over
24 you to hold you, even though we are in the appeal process." (Response, #17, Exh. A., Letter
25 10/16/07.) Nonetheless, because the original charges were reinstated, Petitioner is in the
26 shoes of any other criminal defendant standing accused of a crime. Accordingly, the state
27 court has repeatedly directed that Petitioner be held in state custody at the county jail.
28 (Answer, #13 at Exh. 1, Orders of Detention). Thus, Petitioner is being detained by state

1 authorities, and not federal authorities.

2 None of Petitioner's ground for relief establish any impropriety with regard to his state
 3 custody as a pretrial detainee. In Ground 1, he simply argues that his federal supervised
 4 release has expired. In Grounds 2, 3, and 4, he argues that he has been denied various
 5 procedural rights by the federal court with regard to the imagined federal detention. None
 6 of these arguments apply to his state pretrial detention. Accordingly, Petitioner's Petition is
 7 without merit and should be denied.

8 **Motion to Transfer** - Petitioner has moved for a transfer to federal custody to initiate
 9 his challenges to the alleged violation of his supervised release. Because the Petition must
 10 be denied, any request for preliminary relief is moot. To the extent that Petitioner simply
 11 seeks to obtain a hearing on his pending federal proceedings, he fails to establish any grounds
 12 for habeas relief. Rather, any such relief should be sought within his federal criminal
 13 proceeding.

14 **Dispositive Motions** - In addition to answering, Respondents have moved to dismiss
 15 or in the alternative for summary judgment. Habeas proceedings are, by their nature,
 16 presumptively summary proceedings. *See* Rules Governing Section 2254 Cases, Rule 8
 17 (determination whether hearing required) and Rule 1 (rules applicable to § 2241
 18 proceedings). In light of the determination of the merits of the Petition, these motions are
 19 moot.

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21 **IV. RECOMMENDATION**

22 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Petition for Writ of
 23 Habeas Corpus, filed January 29, 2008 (#1) be **DENIED**.

24 **IT IS FURTHER RECOMMENDED** that Petitioner's Motion for Request for
 25 Transfer, filed August 11, 2008 (#27) be **DENIED**.

26 **IT IS FURTHER RECOMMENDED** that Respondent's Motion to Dismiss, filed
 27 August 11, 2008 (#32) be **DENIED** as moot.

28 **IT IS FURTHER ORDERED** that Respondents' Motion for Summary Judgment,

1 filed August 11, 2008 (#32) be **DENIED** as moot.

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V. EFFECT OF RECOMMENDATION

4 This recommendation is not an order that is immediately appealable to the Ninth
5 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*
6 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

7 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall
8 have ten (10) days from the date of service of a copy of this recommendation within which
9 to file specific written objections with the Court. Thereafter, the parties have ten (10) days
10 within which to file a response to the objections. Failure to timely file objections to any
11 factual or legal determinations of the Magistrate Judge will be considered a waiver of a
12 party's right to *de novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328
13 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*).

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DATED: March 6, 2009

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JAY R. IRWIN
United States Magistrate Judge

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